

POL 1120 WATER RESOURCES PROGRAM POLICY FOR CONDUCTING TENTATIVE DETERMINATIONS OF WATER RIGHTS

Resource Contact: Policy and Planning Section Effective Date: August 30, 2004
Revised: NEW

References: RCW 43.27A.190; RCW 90.03.290, 90.03.380, 90.03.390 & 90.03.397;
RCW 90.44.100 & 105; RCW 90.14.130; and POL 1070 and 1200

Purpose: To define tentative determinations and describe situations in which a tentative determination of a water right is required. The policy sets forth methods and tools which can be used to conduct a tentative determination.

Application: This policy is applicable to the investigation of changes or transfers to existing water rights and enforcement actions.

This policy supercedes any previous policy statement with which it conflicts.

Definition. The following definition is intended within this policy:

“Tentative determination,” means a determination of the extent and validity of an existing water right established pursuant to either chapter 90.03 RCW or 90.44 RCW, or claimed pursuant to chapter 90.14 RCW. Such determinations are tentative, as final determinations of the extent and validity of existing water rights can only be made by Superior Court through a general adjudication of water rights.¹

Evaluation.

1. Who makes a tentative determination?

The department of Ecology or a water conservancy board may make a tentative determination.

2. What is a tentative determination?

A tentative determination is a water conservancy board’s or the department of Ecology’s finding of the amount of water perfected and beneficially used under a water right that has not been abandoned or relinquished due to non-use. In a proposal to change or transfer a water use, a tentative determination may include a decision as to the portion of

¹ Recent court cases have concluded that the department’s authority on making tentative determinations is limited to establishing the degree to which water use complies with the attributes of the water right, rather than adjudicating between water users. See *Rettkowski v. Department of Ecology*, 219 Wn. 2d 219, 858 P. 2d 232; *R.D. Merrill v. Pollution Control Hearings Board* 137 Wn. 2d 118, 969 P.2d 459 (1999); *Okanogan Wilderness League v. Town of Twisp* 133 Wn. 2d 769, 947 P. 2d 732 (1997) and *Public Utility District Number One of Pend Oreille County v. Department of Ecology* 70372-8 (2002).

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the water right that is eligible for change, for instance, in some cases only consumptively used water may be eligible for change. A tentative determination is conducted for all uses associated with the entire certificate, permit or claim. In situations where forfeiture of water is not an issue, a simplified tentative determination may be needed.

3. Under what circumstances should a tentative determination be conducted?

A tentative determination is made in association with Ecology's and water conservancy boards' permitting activities. A tentative determination is required when:

- a. Evaluating uses associated with an existing surface water right that is the subject of an application for change or transfer under RCW 90.03.380, 90.03.390 or 90.03.397;
- b. Evaluating uses associated with an existing groundwater right that is the subject of an application for change, transfer, or consolidation under RCW 90.44.100, 90.44.105, or 90.03.380;
- c. Evaluating water uses appurtenant to the existing and proposed place of use under an application for change or application for a new water right;
- d. Evaluating water uses that may be considered as potentially impaired under an application for change or application for a new water right;
- e. Evaluating existing water uses associated with water rights pursuant to RCW 90.14.130 or other regulatory statutes that results in a departmental order.

4. When, for example, is a tentative determination not warranted?

- a. When the department administratively recognizes the division of a water right resulting from a property sale or transfer pursuant to the provisions of POL 1070.
- b. When consolidating exempt wells under an existing water right permit or certificate pursuant to RCW 90.44.105².
- c. When a water right is donated pursuant to RCW 90.42.080(1)(b) & 5, and 90.42.040(9)³.
- d. When a water right is acquired as a result of a water conservation project pursuant to RCW 90.42.040(7)³.
- e. When a replacement well is installed pursuant to RCW 90.44.100.

² The water quantities associated with the exempt well are established by RCW 90.44.105 or by agreement with the Department of Health.

³ Chapter 90.42 RCW contains various requirements for determining the extent and validity of trust water right acquisitions. See *Washington Water Acquisition Program, Finding Water to Restore Streams* (March 2003, Publication No. 03-11-005).

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5. What is a simplified tentative determination?

A simplified tentative determination may be conducted when a tentative determination or other actions confirming beneficial use of the water right has recently occurred. Under these circumstances, an investigation of the complete history of the water right is not required. Instances where simplified tentative determinations can be conducted include:

- a. The existing water right has had recent departmental action, such as the issuance of a change approval within the last 5 years;
- b. The existing water right was confirmed as part of an adjudication or other court action that determined the extent and validity of the right within the last 5 years;
- c. The existing water right is for a municipal water supply in accordance with RCW 90.03.330(3).

6. How are tentative determinations conducted?

Generally, tentative determinations include an examination of the record of historic water use. Year-by-year demonstration of water use may not be required for the evaluation. However, yearly water use records may be appropriate if such records are available, if there are allegations of non-use, or if the proposed action prompts a closer examination of the water right record. For instance, water right changes which involve adding irrigated acres to an existing water right or adding an additional purpose of use require an assessment of the most recent five years of continuous water use.⁴ For simplified tentative determinations (conducted on water rights where forfeiture of water is not an issue), year-by-year demonstration of water use is generally not required.

- a. Examine the available materials to verify the applicant's assertions of historic beneficial use of water. The agency may require adequate information be provided by the applicant, may conduct its own investigation, or may do both. Evidence of the extent of the beneficial use, water quantities used, and other characteristics of the water use may include direct water measurement and observation by the investigator, declarations and affidavits of parties with personal knowledge of historic water use on the subject property, water meter records⁵, power records, crop or product sales records, water billing records, population estimates, county assessor records, aerial or other historic photographs, remote sensing imagery, crop irrigation guides, water duty publications, land use or tax records, field surveys and other data.
- b. Materials should be reviewed so that a reasonable, objective conclusion can be made as to project intent and initiation, the date of first use of the water, the period and rate of

⁴ See POL 1210 and PRO 1210 for guidance on establishing water use and estimating the annual consumptive quantity of a water right.

⁵ Ecology prefers metered water use data when available (Chapter 173-173 WAC).

development of the original water use, the history associated with any expansion or contraction of water use, and the quantity of water appropriated on both an instantaneous and annual basis, the place of use and the purpose of use. The review should investigate whether the materials support a pattern of consistent water use to determine if subsequent to the perfection of the water right, some or all of the water right has been forfeited or abandoned. A prolonged period of non-use should be a signal to the investigator to request additional information from the applicant or to assemble additional materials that may provide a clearer picture of historic water use. Although there are numerous tools and methods available for reviewing historic use of water under a water right, generally tentative determinations require taking the following steps:

- i. *Evaluate the instantaneous and annual quantities of water diverted or withdrawn and put to beneficial use, including determinations of consumptive and nonconsumptive use.* Any evidence that supports the applicant's assertions of water use should be examined. The investigator should work with the applicant to assemble the information necessary to determine historic beneficial use. The tentative determination will consider whether the water quantities diverted or withdrawn are consistent with a reasonable water use in accordance with *Ecology v. Grimes*.⁶
- ii. *Verify the source of water.* Verification of the existing water source, through a site visit and/or hydrologic or hydrogeologic evaluation, should be done in conjunction with evaluating historic records of diversion or withdrawal quantities.
- iii. *Determine the location of the diversion or withdrawal facilities.* Determine the location of the existing diversion or withdrawal facilities and consider whether the location of the facilities have changed since establishment of the water use. Additionally, consider whether there have been modifications to the original facility that may imply that the water quantities available through the existing system differ from water quantities available through any previous system. Historic information or site observations of remnant portions of old diversion or withdrawal systems should alert the examiner that additional information may be necessary to clarify any previous modifications of use.
- iv. *Determine the place of use and extent of beneficial use.* Determine the location of the place of water use. Consider whether the place of use has changed since the water use was established. Consider whether the original water diversion or withdrawal facility could have supplied water to the existing place of use.

⁶ See *Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993)

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- v. *Determine the purpose of use.* Determine the purposes of use to which the water has been historically applied and the quantities of water beneficially used for each purpose of use. Consider whether the existing water uses are consistent with historic water uses.
 - vi. *Determine the period of use associated with each beneficial use.* Determine the period of use for each of the recognized beneficial uses.
 - vii. *Determine the date of priority of the water right recognized through a tentative determination.* The date of priority has little import in evaluating the application, since applications for change or transfer and applications for permit can not result in the impairment of *any* existing water right. The priority date is determined by considering the history of establishment of the water use, assertions by the water user, and applicable laws but is necessary to complete the final paperwork at completion of the change/transfer.
- c. The investigator should use best professional judgment in determining the amount of data needed and in making a tentative determination of the extent and validity of a water right.
7. Tentative determinations in the face of unauthorized changes to water rights.
- a. In some situations, changes to historic uses associated with water rights have been made in the diversion or use of water without first obtaining authorization for the changes pursuant to chapters 90.03 and 90.44 RCW. Such unauthorized changes to existing water rights are commonly referred to as “de facto, or after-the-fact changes”.
 - b. When evaluating unauthorized changes to water rights⁷, the department generally considers beneficial use to be the measure of the right, even if some attributes of the right may not be consistent with the current authorization⁸. However, determining whether the beneficial use is associated with the right proposed for change can be difficult depending on the unauthorized changes that have occurred. For example, an unauthorized change in point of diversion may be relatively easy to investigate, whereas an unauthorized change in purpose or place of use may be very difficult to investigate.
 - c. Use of water in a manner inconsistent with one’s water right authorization may not result in forfeiture or abandonment of that right, provided such use is beneficial and not wasteful.⁹ Consideration of unauthorized water use as representing beneficial use of the water right is determined on a case by case basis, through careful examination of the

⁷If a permit writer determines that an unauthorized change has occurred that is not the subject of the current application for change, an application and public notice amendments are required.

⁸ Several courts have considered the relative weight of beneficial use and unauthorized changes with conflicting decisions (e.g. *Ecology v. Abbott* (1985); *Ecology v. Grimes* (1993); *Russell Smith v. Water Resources Dept. (Oregon)* (1998); *Ecology v. Acquavella (Lavinal)* (2003); *USA and Pyramid Lake Paiute Tribe of Indians v. Alpine Land & Reservoir Co. and Nevada State Engineer* (2003). The permit writer should consider the circumstances of the specific situation in determining the relative weight of beneficial use and appurtenancy.

⁹ Ecology may use enforcement actions to encourage compliance with RCWs 90.03.380 and 90.44.100.

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specific facts associated with the water right file. Determinations of beneficial use of the water right must be reviewed and approved by the appropriate regional section head.

- i) If the investigation does not support the extent of the original right to the satisfaction of the permit writer and the regional section head, then the permit writer must conclude that the water right, in whole or in part,
 - (1) was not perfected; or
 - (2) has been forfeited; or
 - (3) was abandoned.
- ii) If the investigation supports the extent of the original right to the satisfaction of the permit writer and the regional section head, then the permit writer may include, in whole or in part, the beneficial uses that were not previously authorized within the tentative determination (see POL 1200).

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